FAYETTE CIRCUIT COURT
CIVIL BRANCH
THIRD DIVISION
CIVIL ACTION NO. 14-CI-04474

HANDS ON ORIGINALS, INC. PLAINTIFF-APPELLANT

V

LEXINGTON-FAYETTE URBAN COUNTY
HUMAN RIGHTS COMMISSION DEFENDANT-APPELLEE

and

AARON BAKER FOR GAY AND LESBIAN
SERVICES ORGANIZATION DEFENDANT-APPELLEE

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OPINION AND ORDER

Following the Hearing Commissioner's Opinion and Order filed on October 6, 2014 and the adoption of said Opinion and Order by the Lexington-Fayette Urban County Human Rights Commission (hereinafter "Commission") on November 19, 2014, the Plaintiff-Appellant, Hands On Originals, Inc. (hereinafter "HOO") timely filed a Complaint and Notice of Appeal of said Order on December 8, 2014 to the Fayette Circuit Court. This Court thereafter entered an Agreed Scheduling Order setting forth deadlines for the filing of a Motion for Summary Judgment by HOO, Response by the Commission, Reply by HOO and scheduling Oral Arguments on March 13, 2015.

The Court has reviewed the Record for the Commission, the excellent Memoranda from all Counsel and has heard oral Arguments thereon as scheduled. The matter was taken under Advisement by the Court. It is now ripe for decision.

PROCEDURAL HISTORY

Although HOO disputes some of the Hearing Commissioner's recitation of facts in the Order of October 6, 2014, the essential facts are not in serious dispute. HOO candidly admits the essential facts are not material to resolution of this case (HOO Memoranda in Support of Motion for Summary Judgment at pp. 14 – 15). The essential facts as found by the Hearing Commissioner and as determined by this Court from the Commission Record are as follows:

On or about March 28, 2012, Aaron Baker filed a Verified Complaint with the Commission on behalf of the Gay and Lesbian Services Organization (hereinafter "GLSO"). The Complaint alleged that on or about March 8, 2012, HOO denied that organization the full and equal enjoyment of a service when HOO refused to print the official t-shirts for the organizations' 2012 Pride Festival. Following an investigation by the Commission, a determination of Probable Cause and Charge of Discrimination was filed by the Commission against HOO on November 13, 2012. The Charge of Discrimination alleged that HOO violated local Ordinance 201-99; Section 2:33 from the Lexington-Fayette Urban County Government (Sometimes referred to as the "Fairness Ordinance"). This Ordinance generally prohibits a public accommodation from discriminating against individuals, *inter alia*, based upon their sexual orientation or gender identity.

HOO is a small business located in Fayette County, Kentucky which prints promotional materials such as shirts, hats, bags, blankets, cups, bottles and mugs and communicates messages for its customers with these promotional materials. The work is

artistic in nature as well as the design of the promotional material in question. HOO employs five full-time graphic design artists to carry out the expressive purposes of its clients. Blaine Adamson is one of three owners of HOO and has been Managing Owner since 2008. He and his co-owners are Christians who believe that the Holy Bible is the inspired Word of God and that they should strive to live consistently with its teachings. HOO's owners, through Blaine Adamson, as Managing Owner, operate HOO consistently with the teachings of the Bible.

HOO has a stated policy on its website which provides:

> Hands On Originals both employs and conducts business with people of all genders, races, religions, sexual preferences, and national origins. However, due to the promotional nature of our products, it is the prerogative of Hands On Originals to refuse any order that would endorse positions that conflict with the convictions of the ownership.

HOO acknowledges that it is a "public accommodation" as that term is defined in the "Fairness Ordinance" and those sections of the Kentucky Civil Rights Act which are incorporated by reference in the aforementioned Ordinance. At all relevant times herein, Adamson instructed his sales representatives to decline to design, print or produce orders whenever the requested material was perceived to promote an event or organization that conveys messages that are considered by Adamson or HOO to be inappropriate or inconsistent with Christian beliefs. HOO has declined at least thirteen orders over the past several years preceding the filing of this Complaint on the basis that HOO believed the designs to be offensive contrary to their Christian beliefs or otherwise inappropriate.

Sales persons were directed by Adamson to bring proposed orders directly to him if there were any questions about the appropriateness of the orders.

At all relevant times, GLSO was an organization located in Lexington, Fayette County which represents and is an advocate for the gay, lesbian, bisexual, transgender, queer, questioning, intersex and ally community. GLSO holds an annual event called the "Lexington Pride Festival" that supports these persons or its message. Aaron Baker, on behalf of GLSO, charges in the Complaint before the Commission that after having accepted an order to print t-shirts for the Pride Festival in 2012, HOO refused to print the t-shirts allegedly because of the sexual orientation of the GLSO members which is prohibited by the Fairness Ordinance. GLSO is an advocacy group. Through its various programs, publications and other media, GLSO speaks in favor of sexual relationships and sexual activities outside of a marriage between a man and a woman. GLSO seeks to change attitudes concerning this issue and similar issues through its programs and publications. GLSO's members and its constituents and supporters come from all walks of life and all sexual orientations. Aaron Baker, GLSO's former president and the person that filed the Complaint on behalf of GLSO in this case, is married to a person of the opposite sex and does not identify himself as gay.

In February 2012, with the 2012 Lexington Pride Festival being scheduled for June 30, 2012, GLSO board member Shepherd contacted 3 t-shirt printing companies to obtain price quotes for the t-shirts to be used at the 2012 Pride Festival. This board member initially spoke with Kaleb Carter, an employee of HOO. Another individual from GLSO sent an email to Carter providing him with a color print of the desired design

of the t-shirt. Carter reviewed the submitted design and did not express any objection to it at that time. Carter gave GLSO a written quote via email. Carter had not yet presented a copy of the design of the t-shirt to Adamson prior to giving GLSO a written quote.

On or about March 8, 2012 a GLSO representative, Don Lowe, contacted HOO to discuss the quote. Lowe spoke with Adamson in that conversation. At the time of that conversation, Adamson had not spoken to Lowe or any other representative of GLSO regarding the order. Adamson had not viewed a copy of the t-shirt design at that point and did not do so during the phone conversation with Lowe. Adamson questioned Lowe about the GLSO organization, its mission and what the organization generally promoted. Lowe advised Adamson that the organization was the sponsor of the Lexington Pride Festival which was a gay pride festival in downtown Lexington scheduled for the summer. Adamson asked Lowe what would be printed on the shirt. Lowe gave Adamson a detailed description of the front of the t-shirt design. Adamson was thus made aware of the type of activities that typically occur at gay pride festivals including the display of signs and other communications promoting romantic relationships and sexual activity outside of marriages between a man and a woman, the sexually suggestive outfits and costumes and the distribution of sex-related items such as condoms and lubricants. Adamson also understood that groups like GLSO promote messages supporting sexual relationships or sexual activities outside of a marriage between a man and a woman.

It was thus obvious to Adamson from his conversation with Lowe of GLSO, that producing the t-shirts as requested would require HOO to print a t-shirt with the words

"Lexington Pride Festival" communicating the message that people should take pride in sexual relationships or sexual activity outside of a marriage between a man and a woman. Adamson has consistently expressed his belief that this activity would disobey God if he were to authorize HOO to print materials expressing that message. Thus, Adamson told Lowe that HOO could not print the t-shirts because those promotional items did not reflect the values of HOO and HOO did not want to support the festival in that way. Several other printing companies later offered to print the t-shirts for GLSO for free or at a substantially reduced price. HOO even offered to contact other printing companies to get the work done at the same price as quoted by HOO. At no time did GLSO representatives Lowe or Shepherd disclose their sexual orientation and no HOO representative inquired of them about that issue. It is the understanding of the Court that GLSO later got their requested t-shirts printed at little or no cost to that group.

STANDARD OF REVIEW

This case is before the Court on Appeal by HOO from an adverse decision issued by the LFUCG Human Rights Commission. Accordingly, the Standard of Review by this Court is found in KRS 13B.150 which provides in part as follows:

> (1) Review of a final order shall be conducted by the court without a jury and shall be confined to the record,... the Court, upon request, may hear oral argument and receive written briefs
>
> (2) The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the final order or it may reverse the final order, in whole or in part, and remand the case for further proceedings if it finds the agency's final order is:
>
> (a) In violation of constitutional or statutory provisions;

(b) In excess of the statutory authority of the agency;

(c) Without support or substantial evidence on the whole record;

(d) Arbitrary, capricious, or characterized by abuse of discretion;

(e) Based on a ex parte communication which substantially prejudiced the rights of any party and likely affected the outcome of the hearing;

(f) Prejudice by a failure of the person conducting the proceeding to be disqualified pursuant to KRS 13B. 040(2); or

(g) Deficient as otherwise provided by law.

This Court fully understands it is reviewing this matter under the limitations set out in (2) above. The following analysis and Judgment are based on the evidence in the Commission record before the Hearing Commissioner, the Constitutions of the United States and Kentucky and well-settled precedent from the United States Supreme Court.

ANALYSIS AND OPINION

(I) THE ORDER FROM THE HUMAN RIGHTS COMMISSION VIOLATES THE RECOGNIZED CONSTITUTIONAL RIGHTS OF HOO AND ITS OWNERS TO BE FREE FROM COMPELLED EXPRESSION

HOO and its owners have a Constitutional right of freedom of expression from government coercion. The Commission conceded at oral argument that the Commission was created by the Lexington-Fayette Urban County Government and its members are appointed by the Mayor. Thus, the action and the order of the Commission in this case is government action without dispute.

These Constitutional guarantees are found in both the Constitution of the United States (First Amendment) and in the Commonwealth of Kentucky (§1 § 8). The Commission agreed that HOO and its owners have those Constitutional protections when it adopted the Order of the Hearing Commissioner. ("The Hearing Commissioner agrees that these cases support a finding that when the Respondent (HOO) prints a promotional item, it acts as a speaker, and that this act of speaking is constitutionally protected.) (Hearing Commissioner Order at pp 13 – 14). These Constitutional freedoms as noted by the United States Supreme Court in *Wooley v Maynard*, 430 U.S. 705, 714 (1977):

> We begin with the proposition that the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all.

Wooley, supra involved the issue of whether or not the motorists of New Hampshire could be compelled to display a license plate with the motto of "Live Free or Die". The United States Supreme Court held that this was inappropriate state action and concluded that the government could not require the motorist to display the state motto upon the vehicle license plates.

The Hearing Commissioner in its Order attempted to distinguish *Wooley* from the case at bar with the explanation that "In this case there was no government mandate that the Respondent (HOO) speak." (Hearing Commissioner Order at p 14). If this is characterized as a Finding of Fact, it is inaccurate, is not supported by the Record and is clearly erroneous. In fact, HOO and its owners, because they refused to print the GLSO t-shirts that offended their sincerely held religious beliefs, have been punished for the

exercise of their Constitutional rights to refrain from being forced to speak. The statement is not a fair or accurate Conclusion of Law either based upon precedent from the United States Supreme Court. HOO and its owners have a Constitutional right to refrain from speaking just as much as they enjoy the Constitutional right to speak freely. *Wooley, supra.*

The Commission in oral arguments before the Court and in its Memoranda agreed that HOO and its owners have a sincerely held Christian belief that it is contrary to the Holy Bible for persons to engage in sexual activities outside of a marriage between one man and one woman. The Pride Festival is without dispute a strong advocate for sexual relationships outside of that principle.

The Commission in its oral argument says it is not trying to infringe on the Constitutional Rights of HOO and its owners but is seeking only to have HOO "…treat everyone the same." Yet, HOO has demonstrated in this record that it has done just that. It has treated homosexual and heterosexual groups the same. In 2010, 2011 and 2012, HOO declined to print at least thirteen (13) orders for message based reasons. Those print orders that were refused by HOO included shirts promoting a strip club, pens promoting a sexually explicit video, and shirts containing a violence related message. There is further evidence in the Commission record that it is standard practice within the promotional printing industry to decline to print materials containing messages that the owners do not want to support. Nonetheless, the Commission punished HOO for declining to print messages advocating sexual activity to which HOO and its owners strongly oppose on sincerely held religious grounds.

HOO did not decline to print the t-shirts in question or work with GLSO representatives because of the sexual orientation of the representatives that communicated with HOO. It is undisputed that neither HOO representatives Carter nor Adamson knew or inquired about the sexual orientation of either GLSO representatives Lowe or Shepherd. Rather, as is uncontested and actually found by the Hearing Commissioner at page 4 of the Order, the conversation between GLSO representative Lowe and HOO owner Adamson was about GLSO's mission and what the organization generally promoted. GLSO has admitted that the shirt in question communicates messages. In depositions before the Commission, GLSO representatives conceded that the logo on the shirt in question communicates the message that people should be proud about sexual relationships other than marriages between a man and a woman. This statement, of course, is directly contrary to the beliefs and values of HOO and its owners as expressed in its Mission Statement and actions. It is their Constitutional right to hold dearly and not be compelled to be part of the advocacy of messages opposed to their sincerely held Christian beliefs. In short, HOO's declination to print the shirts was based upon the **message** of GLSO and the Pride Festival and not on the **sexual orientation** of its representatives or members. In point of fact, there is nothing in the record before the Commission that the sexual orientation of any individual that had contact with HOO was ever divulged or played any part in this case.

There is ample precedent from the United States Supreme Court that the Commission in its Order violated the Constitutional rights of HOO and its owners in its Order issued November 19, 2014. *Hurley v Irish-American Gay, Lesbian and Bisexual*

Group of Boston, 515 U.S. 557 (1995) illustrates this principle. In *Hurley*, parade organizers in Boston had refused to allow a group of gay, lesbian and bisexual decedents of Irish immigrants to march in a St. Patrick's day parade. The group sued. This case also involved a "public accommodation" law like the case at bar. The issue in *Hurley* as framed by the United States Supreme Court was whether a government could require a private citizen to include marchers of a group imparting a message the organizers do not wish to convey. The United Stated Supreme Court **unanimously** held that such a mandate violates the First Amendment. The public accommodation law in *Hurley* was similar to, if not a close recitation of, the "Fairness Ordinance" in the case at bar. If Massachusetts could not compel parade organizers to include a group advocating a message that the parade organizers did not support, how can the LFUCG Human Rights Commission interpret the "Fairness Ordinance" to compel HOO and its owners to print a t-shirt conveying a message that HOO and its owners do not support and in fact find blasphemous? The Court holds that the Commission cannot take this action consistent with the U.S. Constitution.

Similarly, in *Boy Scouts of America v Dale*, 530 U.S. 640 (2000) the United States Supreme Court was faced with the issue of whether or not the Boy Scouts of America could expel an assistant scout master under New Jersey's public accommodation law after he publicly declared he was homosexual. The United States Supreme Court held that applying New Jersey's public accommodations law to require the Boy Scouts to admit the assistant scout master violated the Boy Scouts' First Amendment right of expressive association. There is no question in the case at bar that HOO, in designing

and printing promotional materials, engages in "expressive association" which the Unites States Supreme Court upheld as a First Amendment right in *Dale*. Like the Boy Scouts in *Dale*, HOO is entitled to claim First Amendment protection as a for profit corporation in this case. *Hurley, supra*. The message on the t-shirt in question is undoubtedly expressive association in advocating pride in sexual activity outside of a marriage between one man and one woman. HOO and its owners have a Constitutional right to that sincerely held religious principle. The infringement and violation of same by the Commission is contrary to established United States Supreme Court precedent and the Constitution of both the United States and Kentucky.

The Commission Order held and adopted the Hearing Commissioner Opinion that "...the application of the Fairness Ordinance does not violate the Respondent's (HOO) right to free speech, does not compel it to speak, and does not burden the Respondent's (HOO) right to be to the free exercise of religion". This statement is not supported by the facts in the record before the Commission and is contrary to well established precedent from the United States Supreme Court and the Constitutions of the United States and Kentucky. That statement is also clearly erroneous as a matter of law and as a conclusion of law. The exact opposite is, in fact and law, true.

This Court has undertaken review of this case based upon KRS 13B.150 and under the doctrine of "strict scrutiny." The Commission Order applies to "speech", the "free exercise thereof", and violation of the Constitutional right of HOO and its owners to refrain from compelled expression. This Court does not fault the Commission in its interest in insuring citizens have equal access to services but that is not what this case is

all about. There is no evidence in this record that HOO or its owners refused to print the t-shirts in question based upon the sexual orientation of GLSO or its members or representatives that contacted HOO. Rather, it is clear beyond dispute that HOO and its owners declined to print the t-shirts in question because of the MESSAGE advocating sexual activity outside of a marriage between one man and one woman. The well established Constitutional rights of HOO and its owners on this issue is well settled and requires action by this Court.

(II) THE COMMISSION'S ORDER VIOLATES HOO'S AND ITS OWNERS'FREE EXERCISE OF RELIGION PROTECTED BY KRS 446.350

In a summary paragraph found on page 16 of the Order from the Hearing Commissioner, which was adopted by the Commission, the following statements are made:

> The evidence of record shows that the Respondent (HOO) discriminated against the GLSO because of its members' actual or imputed sexual orientation by refusing to print and sell to them the official shirts for the 2012 Lexington Pride Festival. In addition, the Hearing Commissioner holds that the application of the Fairness Ordinance does not violate the Respondent's (HOO) right to free speech, does not compel it to speak, and does not burden the Respondent's (HOO) right to the free exercise of religion.

With all due respect to the Hearing Commissioner and the Human Rights Commission, these statements are not factually accurate and are in direct contrast to well established precedent from the United States Supreme Court interpreting the Federal Constitution. Further, KRS 446.350 provides as follows:

> Government shall not substantially burden a person's freedom of religion. The right to act or refuse to act in a manner motivated by a sincerely held religious belief may not be substantially burdened unless the government proves by clear and convincing evidence that it has a compelling governmental interest in infringing the specific act or refusal to act and has used the least restrictive means to further that interest. A "burden" shall include indirect burdens such as withholding benefits, assessing penalties, or an exclusion of programs or access to facilities.

Both HOO and its owners are entitled to assert claims under this statute. The statute protects the religious freedom of all "persons" in Kentucky. While "person" is not defined in KRS 446.350 specifically, it is defined in KRS 446.010(33) to include corporate bodies and other companies. The statute's protection applies to corporations like HOO. See *Burwell v Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2768 – 69 (2014). The fact that HOO is a for profit corporation does not deprive it from having standing on this issue. *Hobby Lobby, supra*

The statute is applicable to the case at bar because HOO and its owners exercise of religion was motivated by the owners sincerely held religious beliefs. The Commission has admitted that HOO and its owners religious beliefs are sincerely held and that the sincerity of their beliefs is not at issue. (Commission Order at p 8). The Commission's Order substantially burdens HOO's and its owners' free exercise of religion wherein the government (Commission) punished HOO and its owners by its order for exercising their sincerely held religious beliefs. This is contrary to established Constitutional law. *Sherbert v Verner*, 374 U.S. 398, 403 (1963). Because the Commission's Order requires HOO and its owners to print shirts that convey messages contrary to their faith, that Order inflicts a substantial burden on their free exercise of religion.

As this Court has determined that the Commission's Order substantially burdens HOO and its owners free exercise of religion, the Court must look to the Commission to "…prove by clear and convincing evidence that it has a compelling governmental interest in infringing the specific act or refusal to act and has used the least restrictive means to further that interest." KRS 446.350. In the case at bar, the Commission has not even attempted, much less shown by "clear and convincing evidence" or otherwise, that it has any compelling government interest in the consequences imposed upon HOO and its owners in this case. As previously mentioned, it is the understanding of this Court based on the record that GLSO was able to obtain printing of the t-shirts in question at a substantially reduced price or perhaps even had them printed for free. This was the offer extended by HOO owner Adamson in the initial phone conversation with a GLSO representative to refer GLSO to another printing company to do the work for the same price quoted by HOO. The Court holds that the Commission has not proven by clear and convincing evidence or otherwise that it has a compelling governmental interest to enforce in this case. Therefore, it must also be concluded as a matter of law that the Commission's Order violates KRS 446.350 as well.

CONSIDERATION OF OTHER ISSUES RAISED

Although HOO has raised other issues, the Court sees no need to address them in light of the foregoing analysis.

CONCLUSION, ORDER AND JUDGMENT

By reason of the foregoing, it is the Order and Judgment of this Court that the Motion for Summary Judgment and Stay Pending Judicial Review filed by the Plaintiff-

Appellant, Hands on Originals, Inc., should be and is hereby GRANTED. Further, it is the Conclusion, Order and Judgment of this Court that the Commission's Order issued on November 19, 2014 which incorporated by reference the Hearing Commissioner's Opinion and Order issued on October 6, 2014 is hereby REVERSED upon grounds that the Court finds the Commission's final Order pursuant to KRS 13B.150, is:

(a) In violation of Constitutional and statutory provisions;

(b) In excess of the statutory authority of the agency;

(c) Without support of substantial evidence on the whole record;

(d) Arbitrary, capricious, or characterized by an abuse of discretion; and

(e) Deficient as otherwise provided by law.

It is therefore ORDERED AND ADJUDGED that this case is REVERSED AND REMANDED to the Commission with the directions that the Commission VACATE and SET ASIDE its Order issued on November 19, 2014 and DISMISS ALL CHARGES AGAINST HOO.

Dated this 27th day of April, 2015

HON. JAMES D. ISHMAEL, JR.

This is to certify that a true and correct copy of the foregoing Opinion and Order was served upon the following parties, via First Class Mail and e-mail, this 27th day of April, 2015 as follows:

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